

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
Warming Devices Products ) (JNE/FLN)  
Liability Litigation )  
) August 18, 2016  
) Minneapolis, Minnesota  
) Courtroom 12W  
) 2:14 p.m.  
)  
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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL  
UNITED STATES MAGISTRATE JUDGE

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19 Proceedings recorded by mechanical stenography;  
20 transcript produced by computer.

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## P R O C E E D I N G S

(2:14 p.m.)

THE COURT: Good afternoon, everybody. Please be seated. We were back in chambers and nobody showed asking -- please be seated -- nobody came back saying they needed an advance meeting, so here we are and welcome very much.

We have a number of people on the telephone. Telephone people, would one person at least just say something so we know you're there?

MR. GORDON: We heard them a minute ago.

UNIDENTIFIED SPEAKER ON TELEPHONE: We're here.

THE COURT: All right. Thank you. You've given your appearances to the court reporter, so I don't think we need to spend our time on that, do you, Judge Noel?

MAGISTRATE JUDGE NOEL: No.

THE COURT: All right. Does anyone have a thought other than that we move through the joint agenda?

MR. GORDON: Your Honor, I might just briefly, Ben Gordon for the record, address the point you made as you came in about chambers. We were delighted, would have been delighted to have come to chambers and thought it might be useful. We showed up early, but the door was locked, so we didn't want to intrude. We didn't know what the protocol might be, so for future reference, if the Court --

THE COURT: -- would unlock the door, it would be



1 easier to get in?

2 Well, it's a good thing you came all the way up  
3 here to tell us that. I did not realize that the door was  
4 locked. I'm sorry.

5 MR. GORDON: No, I just if you want us here  
6 earlier, we will be here earlier, Your Honor.

7 MR. BLACKWELL: And good afternoon, Your Honors.

8 THE COURT: Good afternoon.

9 MR. BLACKWELL: And what we have to say in that  
10 regard, Jerry Blackwell for the record for 3M, is plaintiffs  
11 had come here early. We didn't know what exactly they might  
12 want to take up early, so if we're going to come early to  
13 have an early discussion with the Court, then it will be  
14 helpful to know what we're going to discuss with the Court,  
15 so that we know what we're coming early for.

16 THE COURT: Okay. Well, we're here now, and if it  
17 turns out that we would like to have a discussion in  
18 chambers, we can do that, but then everybody will have a  
19 chance to know what we're doing. And I will get a little  
20 out of order here with the pretrial.

21 You know, before we get to agenda item number 1,  
22 while it's on my mind, we had a discovery conference, and at  
23 that time, I understand that a number of counsel who were  
24 not directly involved in the discovery dispute were  
25 uncertain about whether they were supposed to be available

1 for that conference. And I anticipate that we will have  
2 conferences like that in the future, and it was our thought  
3 that we didn't need all 50 or 60 lawyers on the phone for  
4 that. That it would be only the counsel from each side who  
5 were actually working on the discovery issue that would be  
6 discussed. And so I know that's out of order, but I did not  
7 want to forget to mention that so that everybody knows  
8 what's going on.

9 MR. GORDON: Understood, Your Honor. Thank you.

10 MR. BLACKWELL: Thank you, Judge.

11 MAGISTRATE JUDGE NOEL: I would just add to that,  
12 certainly you're welcome to have whoever -- both sides are  
13 welcome to have whoever they think they need at such a  
14 conference, but I don't think it's one of those things like  
15 this conference where people can call in and participate by  
16 phone and listen and do whatever. It would just be the  
17 folks who are directly engaged in the discovery dispute that  
18 we're trying to resolve.

19 MR. GORDON: That's good with us, Your Honor.

20 THE COURT: I don't know how much of a problem it  
21 was last time. I think my chambers, maybe Judge Noel's  
22 chambers got at least a few phone calls from people saying  
23 are we supposed to be there? Are we supposed to be on, et  
24 cetera, so that is that.

25 Well, to get right to it, there are requests to

1 modify the pretrial order, which, of course, sets our dates.  
2 Judge Noel, do you think we ought to hear from them or tell  
3 them what our inclination is?

4 MAGISTRATE JUDGE NOEL: No, let's hear, I would  
5 suggest we hear from them if whatever both sides wish to add  
6 to what is set forth in the agenda regarding their  
7 respective positions and why we should adopt one position  
8 over the other and then we can question them and then figure  
9 out what to do.

10 THE COURT: Okay.

11 MR. GORDON: Do you want us to jointly approach  
12 Your Honor or how do you want it?

13 THE COURT: One at a time.

14 MAGISTRATE JUDGE NOEL: One at a time. Let's  
15 start with the plaintiffs. Mr. Gordon, are you the  
16 spokesman on this issue?

17 MR. GORDON: I will be initially, although others  
18 may wish to weigh in if it pleases the Court, Your Honor.

19 MAGISTRATE JUDGE NOEL: Okay.

20 MR. GORDON: I would say that because of the  
21 enormous discovery burden, particularly for the defendants  
22 and the amount of discovery that remains to be done, the  
23 dates for some of the items as we've outlined in our  
24 respective papers probably need to slide with the Court's  
25 blessing. We don't think the trial date, in a nutshell, we

1 think there's plenty of time to do the discovery still in  
2 keeping with the Court's ultimate order for the trial date  
3 at the end of next year.

4 But there are a number of things because of  
5 written discovery and ESI discovery that have not been  
6 completed yet that we had hoped would be finished by the end  
7 of July that necessarily require some of the discovery dates  
8 to move forward in about three to four months we think.

9 We've laid that out in our proposed Exhibit B. I  
10 think the defendants agree with some of that. Some of the  
11 dates may be a little bit different, but we jointly we're  
12 requesting for the Court to extend some of those discovery  
13 deadlines so that we can get those items outlined by the  
14 Court finished within a reasonable time span, and we think  
15 given that the Court set the trial at the end of next year,  
16 that still leaves us plenty of time to live up to those  
17 dates for trial and expert disclosures and so forth.

18 And I would say, Your Honor, our thinking we've  
19 done some, you know, had some meetings on this is that the  
20 trial in this case probably based on the experts that we  
21 have and the discovery we've seen can probably be done in  
22 two to three weeks. We think a trial will be, you know, we  
23 haven't talked to the defendant about this, but that's our  
24 view that we could have it inside of three weeks.

25 And I think Mr. Ciresi and Ms. Conlin in

1 particular may have some comments in the way that can be  
2 managed in terms of past trials in this district with Your  
3 Honor's obvious decision on that. But given that and given  
4 the fact that the Court has set that time aside already, we  
5 would like to not lose the trial date at the end of next  
6 year.

7 MAGISTRATE JUDGE NOEL: So one of the things that  
8 the defendants have requested in their proposed schedule, as  
9 I understand it, is a separate period of time to do  
10 bellwether specific experts, do the plaintiffs have a  
11 position on whether, first, if there need to be bellwether  
12 specific experts? And if so, what dates should be included?

13 MR. GORDON: Your Honor, I might ask Ms. Zimmerman  
14 if she wants to address that specifically. I would say  
15 generally we've laid out the times in our papers, and I  
16 don't believe that we've laid out specific different times  
17 for -- in fact, I think we've stuck to the times for the  
18 bellwether process essentially that the Court has enunciated  
19 already other than maybe a slight delay in December for the  
20 selection of the bellwether cases. But, Ms. Zimmerman,  
21 would you like to address that?

22 THE COURT: Well, right, the defendants have got  
23 basically another year in there. And our question is what's  
24 the plaintiff's view on whether there will be a need for  
25 expert witnesses specifically related to the bellwether

1 cases?

2 MS. ZIMMERMAN: Thank you, Your Honor. I think  
3 that the plaintiffs intended to modify the scheduling order  
4 that the Court entered to begin with, and we don't envision  
5 a requirement that we build in a separate track for expert  
6 discovery specific to individual plaintiffs.

7 Now, certainly, we envision that there will be  
8 discovery from treating physicians and other folks who took  
9 care of the individual plaintiff in particular, but we would  
10 expect that, for example, the infectious disease expert that  
11 we bring in is going to be the same in the general causation  
12 phase as would be, you know, for any particular plaintiff  
13 that comes to trial.

14 THE COURT: Okay.

15 MS. ZIMMERMAN: You know, there are a few  
16 additional issues that the defendants have requested to  
17 build in that, you know, I think we make clear or I hope  
18 that we make clear we oppose.

19 So, for example, with respect to both the proposed  
20 expert discovery in general causation and for the bellwether  
21 causation, the defendants have requested or added in a  
22 subpart B wherein there would be depositions of experts  
23 prior to rebuttal reports and then additional depositions.  
24 We oppose that. We think that there should be one round of  
25 reports, one round of rebuttal reports, and then there

1       should be depositions, but there shouldn't be depositions in  
2       the interim.

3               And as Mr. Gordon indicated, we do believe that  
4       while the discovery, despite the best efforts of the  
5       defendants, has taken a little bit longer than anyone had  
6       potentially hoped, that we have waited a little bit to  
7       notice our depositions going forward, but we have now  
8       started to notice depositions. And it is our expectation  
9       that we will conduct those depositions, and if discovery  
10      hasn't been completed, we'll leave them open such that we  
11      can re-depose witnesses if there is additional documents  
12      produced down the road.

13              So we certainly believe that we're in a position  
14      to continue to adhere to the trial date and the deadline set  
15      forth by the Court.

16              MAGISTRATE JUDGE NOEL: So I don't want to get out  
17      of order or jump ahead, but there is this lengthy list that  
18      plaintiffs have prepared of discovery disputes. Is there a  
19      general dispute about the defendant's discovery production  
20      or is everybody satisfied they're doing the best they can  
21      under the circumstances? And it's just more of it than had  
22      been allotted for timewise?

23              MS. ZIMMERMAN: Your Honor, I think that there is  
24      a broad dispute or concern on behalf of the plaintiffs with  
25      respect to the identified custodians.

1           And by way of brief background, I think in the  
2           initial disclosures, defendants identified five potential  
3           custodians. After review of the documents produced in the  
4           Walton and Johnson matters, which the Court may remember  
5           were the previous cases we identified 39 potential  
6           custodians. That was reduced to I think 37. And from our  
7           list of 39, the defendants have identified 24 potential  
8           custodians for whom they would have electronic documents.

9           We have noticed a 30(b)(6) deposition to  
10          understand why is there a disparity in these numbers and  
11          what happened to the documents, if anything, between the 24  
12          that they agree are custodians that they need to produce and  
13          the 39 we had identified. As of this morning, there are now  
14          55 custodians, I think, on Mr. Hulse's e-mail. We had added  
15          three additional folks yesterday.

16          So there's a concern just to make sure we're  
17          capturing all of the relevant discovery, and we have an  
18          opportunity to get through that discovery in advance of the  
19          deadline set forth by the Court.

20          So that, I think, is broadly speaking if you look  
21          at the chart that we've prepared, that is a frequent in  
22          almost every single chart entry, it really has to do with  
23          the custodians identified by defendants. It's plaintiff's  
24          position that we serve discovery, and they have the  
25          obligation to figure out which custodians may have documents



1 responsive to the discovery we propounded, and that it is  
2 not the plaintiff's burden to identify these are the 24 or  
3 39 or however many that you should be looking for. We think  
4 they need to look for anybody that's responsive. And I  
5 think that that is one dispute in a very general way that  
6 addresses a lot of the issues in the chart. There are also  
7 some additional discreet issues, but I think that that's the  
8 broadest issue at this point.

9 MAGISTRATE JUDGE NOEL: Thank you.

10 THE COURT: Mr. Blackwell, did you want to talk  
11 about the schedule?

12 MR. BLACKWELL: Thank you, Your Honor.

13 And pardon if I'm a little bit discursive in  
14 addressing the various issues that were just discussed with  
15 the Court, but since Your Honor Judge Noel was on the  
16 discovery question just as counsel sat down, I did want to  
17 make sure the Court was aware that as of April of this year,  
18 we got served seven requests for production of documents  
19 that spans some 250 different categories, not just general  
20 causation. It was fairly expansive.

21 And we've responded now with nine different  
22 productions I think to date; 65,000 different documents, and  
23 close to a million pages in terms of what we've produced to  
24 the plaintiffs spanning some 25 years even. And so at this  
25 point, all of the documents, you know, plus or minus some

1 stragglers that relate to general causation, not necessarily  
2 all of the e-mails, but all of the documents, the R&D, the  
3 testing, et cetera, we've produced. We've done that.

4 We are having an ongoing discussion with  
5 plaintiffs as to discovery because to date we've gotten a  
6 thousand pages worth of discovery in response to our request  
7 to plaintiffs, so we have a lot to talk about there. And we  
8 are very concerned, as I raised with Your Honors at the  
9 start of this case, that this is a science case.

10 They have made the claim to have a product that  
11 causes surgical site infections, and we wanted to know what  
12 the basis is for making that claim day one, there is  
13 supposed to have been a good faith basis based upon a  
14 reasonable investigation. And we're going to try and work  
15 it out with them, but also all of our responses are to the  
16 effect of we're going to tell you the basis for having made  
17 these assertions when you get our expert reports somewhere  
18 down the road whenever that is.

19 So being able to prepare a defense based upon what  
20 the basis is for the plaintiffs' claims, they believe we're  
21 supposed to wait until we get expert reports, which we think  
22 is improper, and the number of very discreet things we've  
23 asked about and asked them for that they basically just  
24 pushed off as premature.

25 So we're going to continue on meet and confer, but

1 we may well be back in front of Your Honors because I think  
2 it's fair to say at this point to use the phrase the  
3 plaintiffs used at the first hearing, their response has  
4 been somewhat anemic at this point, and we're not satisfied  
5 with it.

6 As to the discovery schedule itself, we do agree  
7 that the issue of the predictive coating itself is going to  
8 take more time than anybody anticipated. That alone will  
9 take, we think, probably an additional 90 or so days, and  
10 pushing the schedule back out in respect of that, we think,  
11 frankly, is largely unavoidable. I think everybody has been  
12 working fairly hard at that.

13 MAGISTRATE JUDGE NOEL: What is the status of the  
14 predictive coating? Right now, as I understand it, after  
15 our last discovery conference that Judge Ericksen was  
16 referring to, I understand the parties reached an agreement  
17 on how that's going to play out. Where in that process are  
18 we?

19 MR. BLACKWELL: Right. If I may, Judge, ask if  
20 Mr. Hulse wants to speak to that, he can walk up here or  
21 Behram, also I think probably knows.

22 MR. HULSE: Thank you, Your Honors.

23 So, yes, we did reach agreement on this process,  
24 and the process called for both parties to contribute to the  
25 set of training documents; in addition, for the defendants

1 to do a random set review of documents just from our pool of  
2 over a million e-mails in order to develop an adequate set  
3 of relevant and nonrelevant documents for training. We are  
4 just about done with that.

5 And what that means is then a log, the documents  
6 deemed relevant for the training set plus a log of the  
7 nonrelevant documents are going to go to the plaintiffs  
8 within a few days. There's been a two-week period for them  
9 to evaluate it, for the parties to meet and confer, and if  
10 they have any disputes to potentially address them to the  
11 Court.

12 Once we're in agreement on that, then we go  
13 through the various iterations of actually applying the  
14 predictive coating to the pool of documents until we get to  
15 the point where we're hitting the appropriate rate, the  
16 accuracy rate, basically.

17 MAGISTRATE JUDGE NOEL: Okay.

18 MR. HULSE: And that could, we could be done with  
19 that in a month if all works well or it could take two  
20 months easily to do. And it depends just about how quickly  
21 the parties can reach agreement on essentially what's  
22 relevant and nonrelevant.

23 THE COURT: But you've started, and so far you  
24 haven't hit a bump in the road in terms of, gee, this isn't  
25 going the way you thought it would be, at least at this

1 stage.

2 MR. HULSE: Right. It is, you know, it did, I  
3 think we had different expectations about just if you take  
4 this random set and review how many relevant documents  
5 you're going to get, we found a relatively low number. So I  
6 think where we might hit -- well, I'm optimistic about this  
7 still where we might hit our first disputes is when the  
8 plaintiffs see the sets, the training set that we propose to  
9 use, and whether we have different views at the end of the  
10 day about what is in the scope of relevance and what's not.

11 MAGISTRATE JUDGE NOEL: Okay, thank you.

12 MR. HULSE: Thank you, Your Honors.

13 THE COURT: That's always the case, I think, so.

14 MR. BLACKWELL: And, Your Honors, with respect to  
15 the rest of the schedule, especially as it relates to case  
16 specific experts, I mean there is an over-arching general  
17 causation question in the case which Your Honors heard a  
18 great deal about on science day, both as to whether or not  
19 the science supports the Bair Hugger as a cause of surgical  
20 site infections generally, and then whether there's a  
21 reasonable scientific methodology for ruling out other known  
22 causes of surgical site infections generally.

23 If that question is resolved in plaintiff's favor,  
24 there still remains the question of how it is plaintiffs  
25 establish that in this specific case that the Bair Hugger

1 was the cause, which is a different form of expert  
2 testimony, and whether that's going to be reasonably  
3 reliable, and who says so?

4 And the fact that they have for sake of argument  
5 established that generally it can cause and generally  
6 there's a methodology for ruling out other causes, does not  
7 mean that there was reliable expert testimony for assessing  
8 that it was done in this case. And that is the question  
9 with respect to any expert testimony at a bellwether trial,  
10 which can't be glossed over and would not be satisfied just  
11 by putting on general causation experts. And we're entitled  
12 to know what those opinions are with respect to a specific  
13 cause, to understand the basis for those opinions, to  
14 examine them and ferret them and even challenge them on  
15 Daubert grounds and even summary judgment to the extent  
16 there's a specific case there's not a reliable basis for  
17 having determined in the instance of this specific plaintiff  
18 that the cause was the Bair Hugger. Even if there is a  
19 general scientific causation finding that has not yet been  
20 translated to a specific case. And so for that reason we  
21 built into the schedule the need to be able to address the  
22 question of specific cause, which is different from general  
23 causes, as Your Honor well knows.

24 MAGISTRATE JUDGE NOEL: Do you envision those  
25 being different experts? Or the same expert saying, "Okay,

1 now that I've testified to X, Y, and Z, looking at Ms. Jones  
2 records, here's what I think."

3 MR. BLACKWELL: It may be. I mean that would be  
4 for the plaintiffs to determine in their specific case,  
5 whether they are going to try and rely on treaters in a  
6 given case or if the treater cannot connect all the dots,  
7 whether there's some combination of treater or some general  
8 experts that they may happen to use.

9 MAGISTRATE JUDGE NOEL: In any event, your vision  
10 of this bellwether specific expert is still experts focused  
11 on the issue of causation from the plaintiff's side as  
12 opposed to experts that you might want to call to say, oh,  
13 gee, I think in Ms. Jones case we can show that the  
14 infection came from X, Y or Z.

15 MR. BLACKWELL: Your Honor, it may be obviously a  
16 combination of both of those because we would certainly  
17 reserve the right to put on whatever the proper expert  
18 testimony that disproves the plaintiffs' experts' testimony  
19 on specific causation, and whether that's the same experts  
20 or different ones may to some extent depend on how the  
21 discovery and testimony unfolds in the discovery period.

22 MAGISTRATE JUDGE NOEL: Thank you.

23 MR. BLACKWELL: And so, Your Honor, we built in  
24 some other features into the schedule such as the experts  
25 for selected bellwether cases based upon the Court's

1 invitation that once we lived with the PTO4 for a while,  
2 maybe there could be tweakings kind of here or there and  
3 this is one of them.

4 We also, if Your Honors will see in paragraph  
5 number 18, tried to build in some date for fact discovery on  
6 bellwether, on issues that don't relate to bellwether  
7 specific issues and also don't relate to general causation,  
8 if you look at number 18 inartfully described just now. But  
9 and so this may relate to things such as marketing, you  
10 know, more general advertising and that sort of thing that  
11 aren't related to general causation, aren't related to the  
12 question of whether the Bair Hugger can generally cause  
13 surgical site infections, but may be related to other issues  
14 in the case that are not specific to bellwether issues and  
15 not specific to general causation.

16 THE COURT: So is this, I have my own summary  
17 here, so is this the date that you have after the bellwether  
18 cases are selected? So you're suggesting August 4th of 2017  
19 to select the bellwether cases?

20 MR. BLACKWELL: Yes, Your Honor.

21 THE COURT: And then January 2 of 2018, to start  
22 bellwether specific fact discovery is that what you're  
23 talking about now?

24 MR. BLACKWELL: Your Honor, this is actually for  
25 discovery that does not pertain specifically to the



1 bellwether cases. It's general discovery but not related to  
2 general causation. And presuming there are other issues in  
3 the case that aren't general causation issues, and what we  
4 had envisioned, Judge Ericksen, was a period of time, a  
5 window, where the parties would essentially brief and have  
6 argument and presentations on the over-arching question of  
7 general causation. And if that is answered affirmatively  
8 for the plaintiffs, then to us it makes then sense to delve  
9 head long into case specific discovery bellwether issues.

10 And so we have tried to build into this both some  
11 opportunity for the plaintiffs to undertake discovery not  
12 related to general causation, but related to perhaps an  
13 overarching general case since at this stage we're focused  
14 on general causation. And there may be issues that the  
15 plaintiffs want additional discovery on that aren't general  
16 causation issues but may be liability kinds of issues apart  
17 from causation.

18 And so we tried to build this in here, but we did  
19 try to build into the schedule, Your Honors, some period of  
20 time after the Daubert arguments and summary judgment  
21 arguments pertaining to Daubert for the Court to consider  
22 those arguments and to make a ruling on it before we jump  
23 head long into the case specific bellwether discovery since  
24 that may be mooted should the Court find that the plaintiffs  
25 haven't met the general causation threshold.

1 And so that was part of the reasoning that went  
2 into the dates that we selected here too was that it's from  
3 an efficiency point of view just makes more sense given what  
4 Your Honors have heard already about the over-arching  
5 science issues in the case, to have a question answered as  
6 to whether or not the initial threshold is met with respect  
7 to scientific general causation before we go head on into  
8 preparing for trial, the more specific causation issues are  
9 going to be addressed. So, if --

10 THE COURT: So that must be in here.

11 (Off the record discussion between Magistrate  
12 Judge Noel and Judge Ericksen.)

13 IN OPEN COURT

14 THE COURT: What discovery, non-bellwether  
15 specific fact discovery would be undertaken after the  
16 dispositive motion date?

17 MR. BLACKWELL: Your Honor, an example of such  
18 discovery might be depositions they want to take of  
19 marketing people that want to ask them about things  
20 unrelated to general scientific causation that would not  
21 need to be done before that penultimate question gets  
22 answered would be one type of discovery they may want to do.

23 So we were simply presuming that with the  
24 streamline case schedule we have at this point and  
25 addressing issues of general causation, that there will be

1 other issues in the case that go to more kinds of general  
2 liability questions that may be broader.

3 We have not been very restrictive in kind of how  
4 we're going about our document productions and things, but  
5 nonetheless there is a threshold question in the case that  
6 we are trying to make sure that we produce to the plaintiffs  
7 the types of information that would serve as expert reliance  
8 materials that they have experts who are going to give  
9 opinions about general causation. And so to the extent that  
10 comes from 3M, we're trying to make sure they have that, and  
11 that's what's in the 65,000 documents and close to a million  
12 pages.

13 MAGISTRATE JUDGE NOEL: But are there document  
14 requests that you are responding to limited to general  
15 causation or are they already now addressing some of these  
16 broader things like marketing or other non-general causation  
17 but not case specific?

18 MR. BLACKWELL: You know, probably, Judge Noel,  
19 and Mr. Hulse maybe can speak to this more directly, but I  
20 would answer that probably obliquely. I mean we have really  
21 focused on producing to plaintiffs --

22 MAGISTRATE JUDGE NOEL: That's scary.

23 THE COURT: Yeah, we'll hear from Mr. Hulse then.

24 MR. BLACKWELL: Very well, Your Honor.

25 THE COURT: I was under the impression that there

1       some time ago had been discussion about whether you were  
2       going to turn over marketing materials and that sort of  
3       thing and that you had been, so that's why I guess I thought  
4       that the discovery was proceeding apace on that as well.

5               MR. HULSE: Absolutely, and it is, Your Honor. We  
6       haven't restricted or said we are only producing on general  
7       causation.

8               THE COURT: And they're asking.

9               MR. HULSE: That's right. You know, we think that  
10       half of the discovery they've served as you can't connect it  
11       up to general causation anyway. What we've told the  
12       plaintiffs, and I think I said to the Court last time, is  
13       we've prioritized, however, in the review and the production  
14       of the documents that we think everybody can agree are the  
15       most germane to general causation, and that is the  
16       regulatory documents, the testing documents, the R&D, but at  
17       the same token, we've produced thousands and thousands of  
18       marketing documents too.

19              THE COURT: Well, and you're producing e-mails.

20              MR. HULSE: Yes, absolutely.

21              THE COURT: You don't have all of those done yet  
22       but you're on the --

23              MR. HULSE: No, exactly, so the 24 custodians who  
24       are subject to the predictive coating, many of them are  
25       marketing people, but I think -- so while document

1 production goes apace, we also have a lot of depositions to  
2 do on the topic of general causation, and the thought is  
3 that the parties shouldn't have to also get done all these  
4 depositions, which I expect that they want to do, of  
5 marketing people who are not going to be the people who are  
6 giving the testimony that their experts are then going to  
7 rely on in terms of whether the Bair Hugger was capable of  
8 causing a surgical site infection. Those may be appropriate  
9 to be deferred rather than jammed in, and those are outside  
10 the scope of general causation.

11 But, yeah, to be absolutely definitive, we have  
12 not restricted our production. We are not restricting our  
13 production to exclude marketing or any other type of  
14 documents responsive to their request.

15 MAGISTRATE JUDGE NOEL: Okay.

16 MR. BLACKWELL: So, Your Honors, that's it on the  
17 schedule. I do have a request I would make with respect to  
18 the 45-page or so chart on discovery issues that I could  
19 wait until --

20 MAGISTRATE JUDGE NOEL: I think we're coming back  
21 to that. That's a different line item on our agenda.

22 THE COURT: Forty-five pages of documents  
23 deserves, we thought, its own line item.

24 MR. BLACKWELL: Right. And, Your Honor, once you  
25 hear about it, I think it does not. So I'll sit down. I'll

1 explain why, I should say. Thank you, Your Honor.

2 MS. ZIMMERMAN: Your Honor, may I address the  
3 Courts just briefly on one piece, the scheduling piece?  
4 With the Courts' pleasure, so I think that it's not a secret  
5 to the Court that we have a disagreement about the  
6 definition of general causation, but because the defendants  
7 have represented multiple times to the Court that there are  
8 no documents being withheld based on that definition and  
9 because we still expect all of the documents are going to be  
10 produced by the end of September or October, we do believe  
11 that we'll be in a position to conduct discovery and  
12 complete it.

13 I do want to address though the issue of marketing  
14 specific as an example of how our general causation  
15 definition differs, so we certainly think that marketing is  
16 going to be relevant because included within marketing, as I  
17 understand it, 3M includes post-market surveillance  
18 information. They believe that reports that their folks  
19 received from the field fits into the category of marketing.  
20 Our experts certainly think that that is going to be very  
21 relevant information and potentially should maybe be  
22 classified as regulatory, but we certainly think that even  
23 under the defendant's understanding of a general causation  
24 definition, that those are key and important subjects and  
25 documents that we'll have, so.

1 MAGISTRATE JUDGE NOEL: Just to be sure I'm clear  
2 though then in terms of the defendant's request that the  
3 schedule include a time for fact discovery on non-bellwether  
4 case specific issues and other than general causation, there  
5 doesn't need to be such a period, is that your position?

6 MS. ZIMMERMAN: That is our position, Your Honor.

7 MAGISTRATE JUDGE NOEL: Okay. Thank you.

8 MS. ZIMMERMAN: Thank you.

9 THE COURT: Mr. Blackwell, did you want to say  
10 anything about the request that you have on depositions of  
11 experts, pre-expert disclosures that Ms. Zimmerman touched  
12 on? You're asking for -- or Mr. Hulse -- let's see, you've  
13 got a deadline for deposing initial experts of May, initial  
14 expert reports March, rebuttal experts June. I guess I  
15 don't know what she was referring to, do you? And if so, do  
16 you have a response?

17 MR. HULSE: I can speak to the two of them.

18 MAGISTRATE JUDGE NOEL: Let me tell you what I  
19 understand, if it helps. So what I understood her to say is  
20 that your schedule suggests that after the initial expert  
21 reports are disclosed, there would be a period of  
22 depositions for those experts before any rebuttal reports  
23 get served.

24 MR. HULSE: That's exactly right. The idea is --

25 MAGISTRATE JUDGE NOEL: And that's what's they are

1       opposing and that's what you want, and I guess our question  
2       is explain that.

3               MR. HULSE:  So, you know, our experience certainly  
4       in this court is that typically the party with the burden of  
5       proof has to go first on expert disclosures, and we think  
6       that would certainly make sense here.  And the issues that  
7       matter the most, the plaintiff has got the burden of proof,  
8       and then we should have an opportunity to examine their  
9       expert witnesses on their opinions so that our rebuttal  
10      experts can address that full understanding of their  
11      opinions.  And that seems to me, to us to be a pretty  
12      typical sequence for staging it.  And then, of course, we  
13      disclose our experts in response, and they have an  
14      opportunity to depose them too.  So that's exactly what  
15      we're getting at, Your Honor.

16             THE COURT:  Okay, I understand.

17             THE COURT:  We'll move on to the next plaintiff's  
18      fact sheets.

19             MR. GORDON:  Your Honor, if I may, do you want me  
20      to address that?

21             THE COURT:  Yep.

22             MAGISTRATE JUDGE NOEL:  You have to be at the  
23      microphone before you speak out loud or the people on the  
24      phones won't hear you.

25             MR. GORDON:  Thank you, Your Honor.  Ben Gordon



1 for the plaintiffs.

2 I had the opportunity a few minutes before we  
3 started, along with Mr. Parekh to speak with Ms. Ahmann, and  
4 we asked them if they would be willing to agree to give us,  
5 the plaintiffs, an extra week with the Court's permission.  
6 We're supposed to produce the PFS tomorrow. We've been  
7 through this, and we've had meet and confers, and we've gone  
8 back and forth. And our view is that a more simplified,  
9 streamlined PFS preliminarily initially to give them  
10 everything they need, along with all of the medical  
11 authorizations they need to gather their independent  
12 information would make everything go faster and be better  
13 for both parties.

14 Your Honor, Judge Noel may recall during Stryker  
15 MDL, we had an issue with the breadth and the complexity of  
16 the PFS, and our goal is generally to resolve that ahead of  
17 time. And so what I propose to Ms. Ahmann is an extra week  
18 for us to propose that to them and see if we can work it  
19 out, and we'll give that to them, our proposal, by tomorrow.  
20 And if we can't work it out, then I would propose to the  
21 Court that a week from tomorrow we submit our opposing  
22 views.

23 MAGISTRATE JUDGE NOEL: And what did she say?

24 MS. AHMANN: I have to say yes, I did say I was  
25 agreeable, but I didn't know that all of the colloquy in the

1 background would go with it. We gave them, the plaintiff,  
2 our proposed plaintiff fact sheet about ten days ago. And  
3 our meet and confer consisted of one e-mail saying we'll get  
4 back to you, and then this morning saying, you know, we're  
5 looking at this and this and this.

6 So we will continue to confer with them. We  
7 haven't so far, and we certainly will get something to the  
8 Court. And it may well be this is what we propose, and this  
9 is what they propose. But we will work on it, and we'll get  
10 it to that point.

11 THE COURT: And you're okay with them having an  
12 extra week?

13 MS. AHMANN: As long as we get to meet and confer,  
14 and I get it before Friday afternoon, I would appreciate  
15 that.

16 MR. GORDON: We would have them something early  
17 tomorrow.

18 MS. AHMANN: Yes, they did say they would give me  
19 something tomorrow or early next week, so we're good.

20 MR. GORDON: Thank you, Your Honor.

21 MAGISTRATE JUDGE NOEL: Thank you.

22 THE COURT: Now, the foreign discovery, I've  
23 signed some documents indicating my profound respect for  
24 various foreign countries.

25 MS. AHMANN: And I have to lead it off by saying I

1 apologize if you got confused. We had to file something  
2 again yesterday because one of the people that we thought  
3 that was going to appear voluntarily has decided not to. So  
4 we did file some materials yesterday and sent another  
5 proposed order to the Court relative to one particular  
6 person in the UK.

7 THE COURT: I haven't seen those yet and,  
8 therefore, I'm not confused yet.

9 MS. AHMANN: Oh, well, so you don't need to be  
10 confused because now you know.

11 THE COURT: Okay.

12 MS. AHMANN: Yes, and that is an additional  
13 person. But this is a process that it's like herding cats,  
14 but we're working on it, and we're getting it there. And we  
15 had a meet and confer this morning on some things that we're  
16 trying to work through with regard to the foreign discovery,  
17 and we're working through, and it may come a point where we  
18 have to ask the Court's involvement, but right now I think  
19 we're really doing pretty well.

20 THE COURT: Okay.

21 MR. GORDON: Could I add one thing to that, Your  
22 Honor?

23 THE COURT: Yes.

24 MS. AHMANN: I'm not surprised.

25 MR. GORDON: Sorry. Your Honors, I agree we had a

1 productive meet and confer on those issues today, including  
2 the guidelines or the protocols or how these foreign  
3 depositions may take place. I do anticipate there may be  
4 some sticky issues that we have a little trouble working  
5 out, hopefully not, but I don't want to surprise the Court  
6 with that on the eve of those depositions, which begin around  
7 September 14th, I think, if things go as we expect.

8 So I would want to make sure the Court is on  
9 notice that we may need some help with this before the next  
10 status conference, including potentially the Court's  
11 indulgence if there are disputes at the depositions, which  
12 will be taking place in the UK, which I think is seven hours  
13 ahead. And one of them, in fact, I think, is slated to be  
14 on a Saturday, so we wanted to at least let the Court know  
15 we might be coming to the Court asking for help with that.

16 THE COURT: I'll be in Europe on the 15th through  
17 the --

18 MR. GORDON: That might work out perfectly. Would  
19 you like to come to London?

20 THE COURT: I love London. I'll be in Portugal.

21 MR. GORDON: I love Portugal. But I think we can  
22 let you know better in the next couple of weeks if we'll  
23 need some time with the Court. I just don't want to push it  
24 until the day before the depositions and have blind-sided.

25 THE COURT: But the letters that we've signed, the

1 process that we go through has been working all right. I  
2 sign it, then it goes down and Rich Sletten signs it, then  
3 he comes back, then I sign it again.

4 MS. AHMANN: All is good.

5 THE COURT: Okay. So do we have the revised  
6 master short form complaint?

7 MS. ZIMMERMAN: I'll wait to address until I  
8 approach. Yes, Your Honor, we do have the revised short  
9 form Complaint. And Ms. Young and I had been working  
10 together and wanted to approach the Court on the best way to  
11 submit this document to the Court. If it would be helpful  
12 to feel have an adopting order, which is what we provided to  
13 you last time. Or if it's something that perhaps we should  
14 file in the master docket, and I think that's where we left  
15 things, and we thought we would approach the Court for  
16 guidance on how you prefer it.

17 THE COURT: Okay, good. I did want to talk to  
18 both of you about this, and the clerk's office would be  
19 appreciative of that as well. So do you want to come on up  
20 and both of you tell me what you think makes the most sense  
21 here?

22 MS. YOUNG: Yes, Your Honor. Mary Young for 3M.  
23 As you know, when we went to file our answer, it was  
24 somewhat confusing that there isn't a master complaint in  
25 the docket, so we agree that it makes sense if the Court is

1 willing just to allow plaintiffs to go ahead now and file  
2 their master long form to which we will file our master long  
3 form answer, as well as the revised master short form.

4 MS. ZIMMERMAN: Perfect. We're happy to do that.

5 THE COURT: That's what makes sense. What I don't  
6 know is if you need anything from me, if the clerk's office  
7 will accept that. I didn't see why they wouldn't, but.

8 MS. ZIMMERMAN: Perhaps we'll try and --

9 THE COURT: Just try it and then --

10 MS. ZIMMERMAN: And if there's something we can do  
11 to fix it, we're happy to do so.

12 THE COURT: Yes, and if I need to do something, I  
13 will.

14 MS. YOUNG: All right. Thank you.

15 THE COURT: That was easy. Update on the number  
16 of cases?

17 MS. ZIMMERMAN: I don't know if Mr. Szerlag is on  
18 the phone. I do know that he sent information that we are I  
19 think it's 612 cases that are on file before Your Honor as  
20 of this morning. And I believe that he has provided an  
21 updated contact list to your chambers and the clerk.

22 MR. SZERLAG: Your Honor, it is David Szerlag on  
23 the phone.

24 THE COURT: Hi.

25 MR. SZERLAG: I believe that was Ms. Zimmerman

1 speaking.

2 THE COURT: Correct.

3 MR. SZERLAG: That's correct. The updated list is  
4 (inaudible) 612 cases currently filed, and I believe my  
5 assistant did mail over the updated master list this  
6 morning.

7 THE COURT: Do you think -- by what kind of mail?

8 MR. SZERLAG: I believe it was by e-mail, Your  
9 Honor.

10 THE COURT: Would that be to chambers?

11 MR. SZERLAG: I believe so, yes.

12 THE COURT: Okay.

13 MS. ZIMMERMAN: If there's some problem, I'm sure  
14 we can get you an updated list.

15 THE COURT: Okay. Thank you very much,  
16 Mr. Szerlag.

17 MR. SZERLAG: Thank you, Your Honor.

18 THE COURT: State cases?

19 MS. ZIMMERMAN: Your Honor, I believe that the  
20 report here is accurate. There are about 45, 46 cases  
21 pending before Judge Leary, and we have submitted I believe  
22 all of the orders that he has requested, and we're waiting  
23 for entry of some of those. But it is my understanding, and  
24 I believe it's Ms. Young's understanding that Judge Leary  
25 intends to follow closely behind the MDL.

1 MS. YOUNG: With one exception, Your Honors, we  
2 have not submitted a case scheduling order to Ramsey County  
3 because as we started through that process, we recognize  
4 that that may be not the right forum to be talking about the  
5 modifications that both parties were seeking, and so with  
6 that exception, we have submitted the other proposed orders.

7 THE COURT: I don't think Judge Leary anticipated  
8 that you would have a different schedule over there, so that  
9 makes sense from what I understand about what's going on  
10 there. How is Canada?

11 MS. YOUNG: There's not much going on in Canada.  
12 So we have retained counsel in Canada, and otherwise there's  
13 no case activity yet.

14 THE COURT: Other orders.

15 MS. ZIMMERMAN: Your Honors, we have just recently  
16 started to work together with respect to a potential  
17 deposition protocol that we'll try to work on reducing to  
18 writing and presenting and proposing to Your Honors.

19 I think the other issues that the plaintiffs have  
20 identified as probably meriting proposal to the Court in the  
21 next 30 days or so include a preservation order and  
22 potentially an order on how and when to conduct depositions  
23 in extremis in the event that there are plaintiffs that may  
24 require that.

25 THE COURT: What's a deposition in extremis? One



1 taken when somebody's phone is going off?

2 MS. ZIMMERMAN: I suspect that feels extremis. I  
3 think if someone is ill and expected not to survive to the  
4 conclusion of their case.

5 THE COURT: We've talked about the status of  
6 discovery. I believe that's done.

7 MAGISTRATE JUDGE NOEL: That's the 45-page thing.

8 THE COURT: Oh, that's the 45 page, yeah.

9 MAGISTRATE JUDGE NOEL: So I think we're up to  
10 there now. I was intrigued --

11 THE COURT: Ms. Zimmerman, why don't you be seated  
12 because we're about to say something.

13 MAGISTRATE JUDGE NOEL: I was intrigued by  
14 Mr. Blackwell's last remarks before he sat down, so I'm  
15 going to ask him to start.

16 MR. BLACKWELL: Your Honors, I styled this as  
17 having a request around the 45 pages. And I take it Your  
18 Honor, Judge Ericksen, felt this deserved its own place on  
19 the agenda item, and I said, well, I didn't think so, and I  
20 wanted to explain why I didn't. And I have a bone to pick  
21 with it and a request to make around it.

22 And that 45 pages that landed on Your Honors' desk  
23 just days before we were to come here involved a myriad of  
24 discovery issues that we spent hours and hours and hours  
25 having worked through with the plaintiffs last June and had

1 reached agreement on the whole majority of it. What Your  
2 Honors received made no reference to the agreements that had  
3 been reached on the items -- that even included a  
4 substantial portion of it were items where they met and  
5 conferred about. And we felt that for the Court to spend  
6 inordinate amounts of time, if Your Honors were to do that,  
7 to actually read through the 45 pages would not have been  
8 the most efficient use of the Court's time nor our's either.

9 And the request to make around that is if the  
10 parties have spent many hours reaching agreement on  
11 discovery issues, if any party thereafter decides to change  
12 their minds on the agreements, that we first meet and confer  
13 again.

14 Mr. Hulse, as you probably have surmised, is  
15 driving the discovery efforts on our side, so it's their  
16 person and work through these things. And so we felt to do  
17 a tit for tat, back and forth, over here's what we agreed,  
18 no, we didn't, and so on when this wasn't even referenced to  
19 the Court and what was submitted, is not the most efficient  
20 way to handle it. It creates undue angst that's  
21 unnecessary, and we ought to meet and confer and only  
22 present to the Court those issues that really do require the  
23 Court's attention, as opposed to giving some sort of  
24 historic recitation for whatever the reason that the Court  
25 would spend a bunch of time reading and then find ultimately

1       there may be only a couple of issues out of it, the 45 pages  
2       that the Court even needs to address.

3               And discovery matters for which there has not even  
4       been a meet and confer ought not be set before the Court in  
5       this fashion in the first place, and there are rules that  
6       address that.

7               So, you know, my request with respect to this is  
8       that there are a lot of lawyers involved. And, you know,  
9       and this is an instance where there are infinitely more  
10      plaintiff's lawyers than there are defense counsel involved  
11      in the case, and we can do better than that. And my request  
12      is that we make the effort to do so with respect to the 45  
13      pages.

14              And, Mr. Hulse, if I've spoken out of school with  
15      respect to anything since you were there, you know, say so,  
16      but our concern really was that we had worked through these  
17      issues. And the way it was presented would not have given  
18      the Court any indication of it and that we should have had  
19      another meet and confer, if the plaintiffs were deciding to  
20      take different positions than the ones we had agreed on from  
21      the meet and confer.

22              THE COURT: Did you meet on Monday?

23              MR. BLACKWELL: Ben can speak to this, but we met  
24      starting back last June with them for hours and hours, but  
25      why don't you go ahead and speak to it?

1 THE COURT: But there was a proposal that you were  
2 going to meet with plaintiffs on Monday, August 12th?

3 MR. HULSE: So what I did instead is I met their  
4 deadline. They had given me a Monday morning deadline to  
5 fill in our positions in this chart, and I met the deadline.  
6 And I put into it our understanding based on my notes from  
7 the meet and confer of where we had ended up. And where my  
8 understanding was and from June and from all the subsequent  
9 e-mails first and running the document production, the  
10 understandings that I had.

11 The plaintiff's positions reflected in column 2  
12 were positions that they sent me overwhelmingly before our  
13 meet and confers in June and did not reflect in any way the  
14 discussions we had had, and the compromises to our  
15 positions.

16 So we did then meet yesterday, and I think my  
17 take-away from that is it turned out just as I believed and  
18 then said in my e-mail to Your Honors that we really don't  
19 have very many open disputes. Mentioned the one about the  
20 custodians, that seems to be an open dispute, and then  
21 there's another dispute on some sales documents.

22 But by and large, we were able to work through  
23 these things, and that was our understanding. And twice we  
24 cancelled conferences with Your Honor with representations  
25 from both sides that we'd work through these issues. And it

1 was difficult for us to fathom why all of a sudden a hundred  
2 percent of these issues plus a bunch of new ones were being  
3 presented with an ultimatum that get us your inserts, and  
4 this is all going to the Court. And when we strenuously  
5 objected to it being presented this way, it was submitted  
6 anyway. And we, you know, we've worked well together and so  
7 this really didn't seem consistent with that approach.

8 And the meet and confer we had yesterday was  
9 another productive conference. We should have gone back to  
10 that approach instead of this thing being submitted, this  
11 behemoth being submitted, Your Honors.

12 THE COURT: I wonder if the plaintiffs were  
13 concerned that when we cancelled this meeting for last month  
14 and said get a chart, that there was some intention that  
15 every potential issue be listed, otherwise it would be  
16 waived or something.

17 So I thought, and, Judge Noel, maybe you could do  
18 this and talk about what sort of a chart we had in mind, but  
19 we can hear from the plaintiffs.

20 MAGISTRATE JUDGE NOEL: Yes, again, let's first  
21 hear from the plaintiffs on it. Who is speaking,  
22 Ms. Zimmerman?

23 MS. ZIMMERMAN: Yes, thank you, Your Honors.  
24 Unsurprisingly, we take issue with much of what defendants  
25 have said. This chart was provided in substantially similar

1 form back in May. And the meet and confers that took place  
2 in June were predicated on us providing and preparing a  
3 chart that outlined the requests we made, and why we thought  
4 we were entitled to the documents.

5 Now, I do think that we have had some productive  
6 meet and confers, but the outlying issues remain, and we've  
7 had these significant issues with respect to custodians.  
8 We've had ongoing issues with respect to production of  
9 exemplars and some other things that we could go through on  
10 a line by line item basis.

11 But there are a number of issues that we really do  
12 need to get addressed, and we felt that the best way to do  
13 it was to propose the same exact chart that we provided to  
14 them in May at their request. We provided it to Mr. Hulse  
15 at the beginning of August, and we have kind of alluded to  
16 the Court on the telephone the last two months about our  
17 need to potentially get in front of the Court on these  
18 discovery issues. And we have consistently been told we can  
19 get it done, we can get it done, you know, give us the  
20 information, but none of these documents are actually being  
21 produced.

22 We had requested from defense counsel the  
23 opportunity to bring the issues before the Court in advance  
24 of this status conference, hopefully, the first week of  
25 August, and were assured instead that they would get the

1 comments on the chart back to us in time to have it before  
2 the Court today.

3 And then on Friday, we were told that despite the  
4 assurances that we would have the chart filled in by the  
5 defendant in time to have it before Your Honors, that they  
6 would not be providing those information to us such that it  
7 could be presented to Your Honors.

8 So I don't want the Court to be in a position of  
9 back and forth, and I'd prefer to avoid that, but we do have  
10 discovery disputes. We think that they're significant and  
11 that we need to get resolution to these issues to move the  
12 case forward.

13 So while we did have a meet and confer yesterday,  
14 the issues with respect to this chart that we're just  
15 provided took less than 45 minutes before there was a hard  
16 stop, and we're just in a position where our ability to  
17 communicate a meet and confer is truncated, and we need to  
18 come to the Court with some indication of what our issues  
19 are.

20 THE COURT: Okay. Thank you.

21 MAGISTRATE JUDGE NOEL: So have I heard everybody  
22 on this chart?

23 MR. BLACKWELL: Sufficiently so, Your Honor.

24 MAGISTRATE JUDGE NOEL: Okay. So here's my view,  
25 by my count there's over 90 discovery disputes, and my view

1 is that they're not ripe for resolution in the form that  
2 they have been submitted.

3 Back in June, the Court proposed to assist the  
4 parties, and we had the conference on the phone by which we  
5 indicated how we would likely rule on discreet and limited  
6 number of specific discovery disputes based on a spreadsheet  
7 such as this. This list of 90-plus disputes are kind of  
8 amorphous and not well-defined, and their sheer number make  
9 it unwieldy to try to resolve.

10 And it sounds to me like based on what you both  
11 said about meeting yesterday, that progress was made. Let  
12 me go back, I do have another question for Ms. Zimmerman, if  
13 you would come back.

14 MS. ZIMMERMAN: Yes, Your Honor.

15 MAGISTRATE JUDGE NOEL: So Mr. Hulse tells us as  
16 does Mr. Blackwell that a number of these matters, on a  
17 number of these matters the plaintiff had agreed with the  
18 defendant's proposed resolution. Is it that you never  
19 agreed to any of these? Or you did agree to some but not  
20 others?

21 MS. ZIMMERMAN: I don't know which request that he  
22 was referring to, and if we have mischaracterized the  
23 situation or gone back on our word, I would welcome being  
24 told by them.

25 MAGISTRATE JUDGE NOEL: Well, I heard him say that



1 basically this chart of 90-plus items is a recitation of  
2 90-plus discovery disputes that you identified back in May,  
3 is that correct or incorrect?

4 MS. ZIMMERMAN: Largely correct, yes, Your Honor.

5 MAGISTRATE JUDGE NOEL: And had any of them been  
6 resolved between May and now?

7 MS. ZIMMERMAN: No, Your Honor. And the principle  
8 issue is that the vast majority of the disputes are related  
9 to this issue of the custodians because the limitation from  
10 the defendants is that they are searching these 24  
11 custodians that they have agreed from our list they should  
12 be searching. I guess we're concerned that there may be  
13 other custodians out there that have not been identified by  
14 plaintiffs and are not part of the production.

15 Now, if we're assured either that they have  
16 completely canvassed the entire 3M and Arizant and previous  
17 entities and identified every potential witness and combed  
18 through their files, and we either know that everything is  
19 complete or that they have identified some new people. And  
20 as we said yesterday, there were new people identified, and  
21 there were new names that were identified this morning.

22 Once we have assurance that everybody's files are  
23 being searched and that we're going to have a complete  
24 production, we'll have resolved the vast majority of the  
25 disputes, and we can get into exemplars and sales documents

1 and that sort of thing.

2 MAGISTRATE JUDGE NOEL: Okay. Let me just make  
3 sure I understood what you just told me. If there is a  
4 resolution of this issue regarding custodians, and I'm not  
5 sure I fully understand exactly how that issue would be  
6 framed. But if that issue is resolved, most of these  
7 90-plus line items in the chart would go away?

8 MS. ZIMMERMAN: I think that's correct, Your  
9 Honor.

10 MAGISTRATE JUDGE NOEL: Okay. Okay, thank you.

11 THE COURT: Could I just reframe that so I  
12 understand it, just to make sure I understand. You have  
13 been receiving documents from 3M responsive to these 90-plus  
14 other requests, right?

15 MS. ZIMMERMAN: To some of them, yes.

16 THE COURT: And you're just not sure if they're  
17 looking in all the right places?

18 MS. ZIMMERMAN: Correct.

19 THE COURT: And you think it's not your job to  
20 identify the custodians. It's your job to identify the  
21 information that you want.

22 MS. ZIMMERMAN: Correct.

23 THE COURT: And it's their job to look for it.

24 MS. ZIMMERMAN: Correct.

25 THE COURT: And because you've had a somewhat

1 collateral discussion about who the custodians are, you are  
2 left with some unease about whether the research for  
3 responsive documents is adequate.

4 THE WITNESS: Correct, Your Honor.

5 THE COURT: So framing it as finding the  
6 custodians is just a, that's a proxy for the lack of  
7 confidence that they are truly in good faith responding to  
8 the document requests.

9 MS. ZIMMERMAN: That's correct, Your Honor. And  
10 really the objections are that they have searched these 24,  
11 and so it's because of the objection that we raised the  
12 issue.

13 THE COURT: Okay. So what needs to be resolved is  
14 are they absolved from looking any place else by virtue of  
15 arriving at those 24, is that an agreement that is  
16 reasonable? Or do you have a basis that you can show that  
17 that's not a reasonable way to look? Or do you not want to  
18 be involved in the number of custodians? You just want to  
19 say, look, you said at first you were going to search five  
20 people, now you're searching 24 people. How are we supposed  
21 to know you're giving us everything?

22 MS. ZIMMERMAN: Precisely, Your Honor.

23 THE COURT: All right. I can understand that.  
24 That's all I have.

25 MAGISTRATE JUDGE NOEL: I see Mr. Blackwell and

1 Mr. Hulse staring at one another.

2 MR. HULSE: Right. I'll only speak if you want to  
3 hear from me. I can be brief. I promise.

4 MAGISTRATE JUDGE NOEL: Go ahead.

5 MR. HULSE: Given the size of 3M and even the size  
6 of Arizant, it's not practical, it's not realistic,  
7 particularly with the general causation discovery cut-off,  
8 to search the documents of every single person who might  
9 potentially have discoverable information. And so the way  
10 that we typically approach this is we try to reach agreement  
11 on a group of custodians.

12 So it's true that the group of fact witnesses that  
13 we thought that we might potentially call on to testify on  
14 the issue of general causation is pretty small because we  
15 think it's an expert issue. So what we did is we took  
16 plaintiff's list of I think it's over 50 custodians coming  
17 into the MDL, they already had the productions from Walton  
18 and Johnson.

19 So what they did is they put together a very  
20 lengthy list of people current, former employees. So what  
21 we did is we took that list of custodians, and we went and  
22 searched 3M or Arizant files for can we find custodial  
23 documents for any of these people? And we identified 24 on  
24 the list who we were able to find custodial documents for.  
25 And so we said we agree that we will produce documents from

1       those people, a very comprehensive list. We will also  
2       search the central files, the noncustodial files.

3               And in addition to that, what we have done when  
4       there are requests for specific things that we know are not  
5       necessarily in the custodial files, we've gone and gotten  
6       them from additional custodians. So to this day, we have  
7       actually produced documents from the files of about 55  
8       different custodians.

9               But for the purposes of comprehensive review of  
10       custodial files and e-mail, we did think that a limitation  
11       in the zone of under 30 was a realistic and reasonable  
12       limitation especially given that the group of custodians  
13       that we had identified together encompassed the entire  
14       relevant period of time going back to the late 80's, and  
15       also all of the issues, the regulatory, the testing, the  
16       marketing, the sales and so forth. And plaintiffs have  
17       never said that these custodians don't cover the whole area.

18               The other thing that we've always said is if based  
19       on all these documents that we've produced to you, you see a  
20       name and you say, "do you have custodial files?" We think  
21       this is an important person who is not on the list. Tell  
22       us, and if we have documents from them, we can add them as  
23       custodian. And yesterday they gave us two more names, and  
24       we're going to look and make sure that we've got the  
25       custodial files for them, and we can add them to the list.

1 That's been the approach that we've taken.

2 My experience is that's consistent with how things  
3 are done. The plaintiffs approach has been you just have to  
4 produce everything from 3M, and you have to look every  
5 where. I didn't think that's where we were at in our June  
6 conversations. I thought that they had agreed to our  
7 approach of these are our initial custodians, and we can do  
8 more if you give us more names.

9 But we think that this group is more than adequate  
10 to address the discovery needs and the requests that we have  
11 plus the additional targeted custodial collections that  
12 we've done now for around 30 additional custodians. So we  
13 just don't think that there's been any kind of showing at  
14 this point of the inadequacy of the document production, the  
15 inadequacy of this group of custodians.

16 I'm sorry, I said I'd be brief, and I went on far  
17 too long. Thank you.

18 Okay. Yes, and Mr. Blackwell reminds me, we came  
19 out of those meetings in June, and I think this is still the  
20 case, agreed on just about every other issue. And I think  
21 when we've talked with them and corresponded with them over  
22 the following months, we kept coming back to there are two  
23 or three other specific focused issues that might be ripe to  
24 tee up to the Court, but we could have been doing that  
25 today, but instead that's really lost in the document that

1 was presented to Your Honors.

2 MR. BLACKWELL: And could I just add one point  
3 which Your Honors may find to be somewhat of a non sequitur,  
4 but there's a goose/gander kind of aspect to this when we  
5 ask plaintiffs, for example, for which we have 1,000 pages,  
6 period, to produce all documents and communications they  
7 sent to any governmental agency that relate in any way to  
8 surgical site infection data and surgical site infection  
9 rates, so what do you, the plaintiff's attorneys have?  
10 Their response is to object because this will be viewed as  
11 overbroad and unduly burdensome to even write to the other  
12 plaintiff's lawyers.

13 Subject to that objection, no such communications  
14 exist from members of the plaintiff's executive committee.  
15 They can't even send an e-mail out to a list serve, and  
16 they're combing all over 3M. And so we're going to have  
17 some issues to discuss with respect to their responses which  
18 are, Your Honor, anemic is an understatement.

19 MAGISTRATE JUDGE NOEL: I just want to make sure  
20 I'm clear, so the two things that are before us right now  
21 are, one, what to do about adjusting the pretrial order  
22 number 4, the scheduling order; and, two, what to do about  
23 these discovery disputes? Everything else on our joint  
24 agenda is the parties are working on or have agreed; is that  
25 a correct statement, Mr. Blackwell?

1 MR. BLACKWELL: That's correct, Your Honor.

2 MAGISTRATE JUDGE NOEL: Ms. Zimmerman?

3 MS. ZIMMERMAN: Yes, Your Honor.

4 THE COURT: We'll take about a 10 minute break.

5 MAGISTRATE JUDGE NOEL: Don't leave. We're just  
6 taking a brief recess, and we'll be back.

7 (Short recess at 3:21 p.m.)

8 (3:32 p.m.)

9 IN OPEN COURT

10 THE COURT: Go ahead and be seated. Thank you.

11 All right. I've got a couple housekeeping matters  
12 and I can bring those up after. Why don't you go ahead?

13 MAGISTRATE JUDGE NOEL: Okay. So on pretrial  
14 order number 4, here is what we have decided:

15 The date set forth in pretrial order number 4 for  
16 the first bellwether trial, as I understand it, is November  
17 6, 2017. That date will remain unchanged. As to every date  
18 in between, the Court will adopt whatever schedule the  
19 parties can agree to. And if you cannot agree -- we should  
20 have done this before -- on or before, let's say on or  
21 before next Friday, is that enough time to try to work that  
22 out between you?

23 MR. GORDON: Yes, Your Honor.

24 MR. BLACKWELL: Yes, Your Honor.

25 THE COURT: So if you don't agree by August 26th



1 on adjusting the interim dates, each side should submit your  
2 last best final suggestion as to what the schedule should  
3 be, and the Court will pick one or the other to be the  
4 schedule that governs between now and the first bellwether  
5 trial of November 6th 2017.

6 MR. GORDON: Without any substantive changes  
7 otherwise, Your Honor.

8 MAGISTRATE JUDGE NOEL: Excuse me?

9 MR. GORDON: Without any other substantive  
10 changes, just dates not any changes to the schedule  
11 otherwise.

12 MAGISTRATE JUDGE NOEL: Any whatever you can agree  
13 to, whatever agreements you reach regarding the schedule  
14 that should exist between today and November 6, 2017, that's  
15 what you're to discuss between now and August 26th and  
16 hopefully reach agreement. If you can't reach agreement,  
17 that's the date on which you are to submit your last best  
18 final proposal as to what you think the schedule should be,  
19 and the Court will pick one or the other to be the schedule.

20 MR. GORDON: And I don't want to be dense, Your  
21 Honor, I want to make sure we're perfectly clear when we  
22 come back to you, but that encompasses not adding or  
23 drafting any additional layers or requirements or --

24 MAGISTRATE JUDGE NOEL: Everything is on the  
25 table.

1 MS. ZIMMERMAN: Everything is on the table.

2 MR. GORDON: All right. Thank you, Your Honor.

3 MAGISTRATE JUDGE NOEL: So then as to the 90-plus  
4 items on the 45-page chart, the Court is not going to decide  
5 those today. And here's what we're going to do:

6 It's my understanding based on what the parties  
7 have told us today that if a decision is rendered regarding  
8 an issue regarding the custodians, the number of custodians  
9 and the identity of the custodians, that many if not all of  
10 these items would go away.

11 I'm going to ask the parties to take about five to  
12 ten minutes, we'll take another break, and try to reach  
13 agreement right now today on the formulation of exactly what  
14 that issue is. What is the custodian issue? What's the  
15 question presented regarding custodians? And then I will  
16 give each side an opportunity to submit a memo on that  
17 issue. They would be simultaneous memos. In other words,  
18 once you've identified and agreed upon the question  
19 presented, you will each present a single memo of some  
20 finite number of pages that I'll figure out between now and  
21 then arguing that issue, and then if you want to have an  
22 oral argument about that, we can either do that on the  
23 telephone much like we did with the discovery conference  
24 before, and then the Court will issue an order regarding the  
25 custodians, and then actually it's maybe simultaneous as

1 well. But if there are other issues in here, and by "other  
2 issues" I'm thinking of a finite number of four or five or  
3 six at the most, certainly less than ten, that are separate  
4 and apart from this custodian issue, set those forth in a  
5 chart, and we can have that kind of informal discovery  
6 conference as we did in June where we can try to help the  
7 parties resolve that.

8 And just to be clear, when we have those kinds of  
9 things, it's my understanding, and Judge Ericksen can  
10 correct me if my understanding is incorrect, but it's my  
11 understanding that the Court's participation in those is in  
12 the spirit of Federal Rule of Civil Procedure  
13 16(b)(3)(b)(iv), which is the new rule about requesting an  
14 informal conference with the Court before making a formal  
15 discovery motion. And that when I am talking to you on the  
16 phone under those circumstances, I am attempting to assist  
17 the parties in informally resolving the discovery disputes.

18 If I fail, if we can't help you resolve things,  
19 ultimately somebody is going to need to make a formal  
20 motion. And if you need an Order of the Court, that will be  
21 down the road. But the purpose of the phone conference is  
22 to assist the parties in trying to reach agreement.

23 Now, maybe the way I assist the parties is to tell  
24 you how I'm going to rule if this motion comes before me,  
25 but that's what I have in mind. Is that consistent with the

1 Court's?

2 THE COURT: That's exactly right.

3 MAGISTRATE JUDGE NOEL: Okay. So with all of that  
4 said, what I would suggest is we take -- how long do you  
5 think you it will -- do you think you can agree on what the  
6 actual question presented is on this custodian issue, Mr.  
7 Hulse?

8 MR. HULSE: We can try, but I'm skeptical that it  
9 would by five to ten minutes, Your Honor.

10 MR. BLACKWELL: If I may, Your Honor, if maybe  
11 once Your Honors step out, we also go into the hall and let  
12 plaintiffs talks amongst themselves and just come and get  
13 us.

14 MR. GORDON: That's fair, Your Honor. It might  
15 take 10 or 15 minutes to see if we can reach an agreement.

16 THE COURT: It might be something where we would  
17 want to have a brief chambers conference as well.

18 MR. GORDON: Agreed.

19 MAGISTRATE JUDGE NOEL: Let's do this. Let's us  
20 break until 3:55.

21 THE COURT: Just a second, I'm going to do my  
22 housekeeping because I don't want to forget it. We'll do  
23 that and figure out how long that takes.

24 Okay. There are a number of outstanding motions  
25 that at least the docket believes are undecided. Two

1 categories, one has to do with motions to dismiss that were  
2 filed before the MDL, and nothing has been done. They  
3 haven't been withdrawn.

4 There was some conversation with the defense, I  
5 think maybe by the clerk's office some time ago, but the  
6 docket still indicates that they're open. So one way to  
7 resolve that is I could just go ahead and deny them all, but  
8 we can't just have them appear --

9 MS. AHMANN: We'll go ahead and file, Your Honors,  
10 we'll go ahead and file withdrawals.

11 THE COURT: And can you do that soon?

12 MS. AHMANN: Early next week?

13 THE COURT: That's fine. Do you need a list of  
14 the cases?

15 MS. AHMANN: If you have them, that would be  
16 great.

17 THE COURT: Okay, here's what I have. You can  
18 come on up and get them. You can do your own check, but at  
19 least that's something to get started on.

20 And then there are also a number of old pro hac  
21 vice motions that are actually moot because, so I'm going to  
22 deny those as moot. Okay, so now that's it.

23 MAGISTRATE JUDGE NOEL: So let's break until 3:55.  
24 Hold on one second. So we're going to break until 3:55 and  
25 at 3:55, whether you've reached agreement or not, come back

1 to chambers, and we'll be waiting for you.

2 MS. ZIMMERMAN: Could I ask the Court's brief  
3 indulgence, my co-counsel just mentioned that if Your Honor  
4 perhaps is going to be out of the country on the 15th, I  
5 think that might be the date of our next status conference,  
6 if we've counted correct.

7 MR. GORDON: It might be good to go ahead and move  
8 that.

9 MR. HULSE: Move it to Portugal.

10 THE COURT: My flight is not until after. I  
11 scheduled that in mind. I think I did. I tried to.

12 So 3:55, and then we'll see you back in chambers,  
13 and then we're done. Then everything that's to be done in  
14 open court I believe is finished.

15 THE CLERK: All rise.

16 (Court adjourned at 3:42 p.m.)

17

18 \* \* \*

19

20 I, Maria V. Weinbeck, certify that the foregoing is  
21 a correct transcript from the record of proceedings in the  
22 above-entitled matter.

23

24 Certified by: s/ Maria V. Weinbeck

25 Maria V. Weinbeck, RMR-FCRR